FILE COPY

Office - Supreme Court, U. S.
FILED
Dec 5 1938

SUPREME COURT OF THE UNITED STATES

October Term, 1938

No. 212

SOUTHERN PACIFIC COMPANY (a corporation),

Appellant,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, WILLIAM G. BONELLI and HARRY B. RILEY, as members of the State Board of Equalization of the State of California, STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, and U. S. WEBB, the Attorney General of the State of California,

Appellees.

BRIEF OF APPELLEES

U. S. WEBB,
Attorney General,
H. H. LINNEY,
Deputy Attorney General,
JAMES J. ARDITTO,
Deputy Attorney General,
Attorneys for Appellees.

65146 CALIFORNIA STATE PRINTING OFFICE

SUBJECT INDEX

Page

STATEMENT OF FACTS 2–4

NATURE OF CALIFORNIA USE TAX—

A. California Use Tax Is Complementary to the California Retail Sales Tax Act 4–5

B. California Use Tax Act As Written and As Administered Imposes a Tax Only on Intrastate Storage, Use or Other Consumption of Property Within the State and Does Not Impose Any Burden Upon Interstate Commerce 5–7

ARGUMENT—

I A State Excise Tax Imposed Directly Upon the Privilege of Using Instrumentalities in Carrying on and Conducting Interstate and Foreign Transportation and Commerce by a Railroad Common Carrier, Is a Direct Burden on Such Transportation and Commerce, Contrary to the Provisions of Article I, Section 8, of the Constitution of the United States 8–10

II A State Excise Tax Can Not Validly Be Applied Indiscriminately and Without Apportionment to an Instrumentality Common to Interstate and Intrastate Commerce 10–11

III The Case at Bar Is Distinguished by Its Facts from the Cases in Which the Privileges Taxed Were Not Acts of Conducting Interstate Transportation 11–23

IV The Unconstitutionality of State Excise Taxation Burdening Interstate Commerce Is Not Avoided by Imposing State Taxes at an Equal Rate on Intrastate Commerce or Other Intrastate Privileges 23–25

V This Tax Is Directly Imposed Upon the Privilege of Engaging in Interstate Commerce and Therefore Is an Undue and Unconstitutional Burden on Such Commerce 26–30

VI The Tax Is Extra-Territorial in Its Operation and Effect and in Violation of the Due Process Clause of the Federal Constitution 30–40

TABLE OF CASES

	Page
Adams Mfg. Co. vs. Storen, 304 U. S. 307	25
American Airways, Inc. vs. Grosjean (1933), 3 Fed. Supp. 995, affirmed 290 U. S. 596	13
American Airways, Inc. vs. Wallace (1932), 57 Fed. (2d) 877, affirmed 287 U. S. 565	13, 22
Bingaman vs. Golden Eagle Western Lines, 297 U. S. 626	18
Central Vermont Railway Co., Inc. vs. Campbell (1937), ---- Vt. ----, 192, Atl. 197, 111 A.L.R. 175	13
Coe vs. Errol, 116 U. S. 517	22
Commonwealth vs. Dixie Greyhound Lines, Inc. (1934), 255 Ky. 111, 72 S. W. (2d) 1032	13
Cooney vs. Mountain States Telephone and Telegraph Company (1935), 294 U. S. 384	10
Coverdale vs. Arkansas-Louisiana Pipe Line Company (1938), 303 U. S. 604	12, 20, 21, 33–35
Eastern Air Transport vs. South Carolina, 285 U. S. 147	12
Eastern Air Transport vs. Tax Commission, 285 U. S. 147	22
Edelman vs. Boeing Air Transport, Inc. (1933), 289 U. S. 249	11, 12
Gregg Dyeing Company vs. Query, 286 U. S. 472	12–28
Helson vs. Kentucky, 279 U. S. 245	18
Helson and Randolph vs. Kentucky, 279 U. S. 245	8
Henneford vs. Silas Mason Company, 300 U. S. 577	4, 12, 27–28, 29–30
McCulloch vs. Maryland, 4 Wheat. 316	26
Midcontinent Air Express Corporation vs. Lujan (1931), 47 Fed. (2d) 266	9
Minnesota vs. Blasius, 290 U. S. 1	22
Nashville, Chattanooga and St. Louis Railway Company vs. Wallace (1938), 288 U. S. 249	11
Nashville, etc. Ry. Co. vs. Wallace, 288 U. S. 249	12, 15–17
Norfolk, etc. Railroad Company vs. Pennsylvania (1890), 136 U. S. 114	32
Oliver Iron Min. Co. vs. Lord, 262 U. S. 172	22
Pacific Telephone and Telegraph Company vs. Henneford (1938) (Wash.), 81 Pac. (2d) 786	9
Pacific Tel. & Tel. Co. vs. Tax Commission, 297 U. S. 403	12, 35–38
Southern Natural Gas Corporation vs. Alabama (1937), 301 U. S. 148	12
Superior Oil Co. vs. Mississippi, 280 U. S. 390	22
Western Live Stock vs. Bureau of Revenue (1930), 303 U. S. 250	12

STATUTES AND TEXTS

California Retail Sales Tax Act 4

California Use Tax Act of 1935 4

Section 2 5–6

Section 3 5

Section 4 6

Federal Constitution, Article I, section 8, clause 3 23

State Board of Equalization Ruling No. 11 7

Statutes of 1933, p. 2599 4

Statutes of 1935, p. 1297 4

In the Supreme Court

OF THE

UNITED STATES

October Term, 1938

No. 212

SOUTHERN PACIFIC COMPANY (a corporation),

Appellant,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, WILLIAM G. BONELLI and HARRY B. RILEY, as members of the State Board of Equalization of the State of California, STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, and U. S. WEBB, the Attorney General of the State of California,

Appellees.

BRIEF OF APPELLEES

STATEMENT OF FACTS

We have carefully read appellant's "Statement of the Case" and "Summary of Facts" and, except for the matters mentioned below, find no substantial objection thereto.

Throughout the statement and summary, appellant speaks of the tax as imposed on or with respect to the use of property in the operation of its intermingled intrastate, interstate and foreign railroad transportation business. It should be observed, however, that the tax is imposed not merely upon the use of property but also upon the *storage* of property (Use Tax Act, section 3), and that it is our contention that tax liability may be based upon the keeping or retention of the property prior to its actual use in the operation of appellant's railroad.

In view of the facts of this case as herein stipulated (R-71) we are justified in stating:

(a) After the completion of the interstate transportation of the property here in question the same becomes a part of the mass of property in the state and is either stored, installed or used in appellant's commingled interstate and intrastate commerce (R-71, particularly pars. 3, 22, 24, 26, 27, 28, 31, 32, 33, 36 and 37).

(b) Wherever storage occurs the same is subsequently followed by withdrawal from storage for the purpose of installation or use (Pars. 31, 32, 33).

(c) Installation may occur without intervening storage in warehouses or company stores, but prior to such installation there has been a holding or retention of the property by appellant, following

the termination of the interstate shipment thereof (Pars. 28, 36, 37).

(d) Installation of materials and supplies takes place in the ordinary course of the transportation business (Pars. 27, 35).

(e) After installation the property is used in the inextricably commingled interstate and intrastate business of appellant (Par. 2).

Appellant asserts that it "purchases the tangible personal property in question for the sole, fixed and predetermined purpose of use in conducting its said transportation business and will continue to purchase like property for such purpose, and so use the same (R. 106, 118, 119)." It should be noted in this connection, however, that certain property purchased by appellant is transferred to and used by foreign railroads in connection with the repair of foreign cars, transferred to and used by subsidiary railroad companies of appellant, and sold to other railroad companies (R 120, 126).

The "Specification of Errors" sets forth sixteen alleged errors of the lower court. Of these sixteen alleged errors Nos. 3 to 14, both inclusive, relate to the failure or refusal of the lower court to make conclusions of law requested by appellant. In substance, the conclusions of law requested by appellant present appellant's theory of the law of the case and inasmuch as appellant's theory of the law of the case was not adopted by the lower court it naturally follows that appellant's requested conclusions of law were rejected by the trial court.

Instead of discussing the alleged errors *seriatim* we will direct our argument at the proper time to the six points discussed by appellant in its brief.

NATURE OF CALIFORNIA USE TAX

A. California Use Tax Is Complementary to the California Retail Sales Tax Act

The California Use Tax Act of 1935 (Stats. 1935, p. 1297) became effective June 25, 1935, and by section 3 thereof imposed an *excise* tax on the storage, use or other consumption in the state of tangible personal property purchased for storage, use or other consumption in the state. The rate of tax is 3 per cent of the purchase price.

The California Use Tax Act is complementary to the California Retail Sales Tax Act (Stats. 1933, p. 2599), in practically the same way that the Washington Compensating Tax Statute is complementary to the Washington Sales Tax Statute. The Washington Compensating Tax Statute was before this court in *Henneford* vs. *Silas Mason Company,* 300 U. S. 577.

There are differences between the Washington statute and the California Use Tax Act but those differences are not believed to be material here.

In the *Silas Mason* case this court upheld the validity of the Washington Compensating Tax as applied to property purchased outside the state and devoted to intrastate uses within the state. This case is discussed later on in this brief.

The California Retail Sales Tax Act imposes upon retailers of tangible personal property within the state an excise tax of 3 per cent of the gross receipts from the sale of such property. As a matter of common practice the retailers "pass on" the tax to the purchasers.

The Sales Tax Act, as amended in 1935, is incorporated herein as Exhibit A.

The Use Tax Act of 1935 is incorporated herein as Exhibit B.

B. California Use Tax Act As Written and As Administered Imposes a Tax Only on Intrastate Storage, Use or Other Consumption of Property Within the State and Does Not Impose Any Burden Upon Interstate Commerce

When the following sections of the California Use Tax Act are read together it becomes obvious that the act, as written, does not purport to levy a tax burden upon interstate commerce.

Section 3 of the act provides in part as follows:

> "An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property."

Section 2 provides in part as follows:

> "The following words, terms, and phrases when used in this act have the meanings

ascribed to them in this section, except where the context clearly indicates a different meaning.

(a) 'Storage' means and includes any keeping or retention in this State for any purpose except sale in the regular course of business or subsequent use solely outside this State of tangible personal property purchased from a retailer.

(b) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business."

Section 4 of the act provides in part as follows:

"The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

(a) Property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Chapter 1020, Statutes of 1933, and any amendments made or which may be made thereto.

(b) Property, the storage, use or other consumption of which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

When Ruling No. 11, adopted by the State Board of Equalization of the State of California pur-

suant to the provisions of the California Use Tax Act, is considered it becomes obvious that the act, as administered, does not purport to impose a tax burden upon *interstate* commerce.

Ruling No. 11 reads as follows:

> "The fact that tangible personal property is purchased in interstate or foreign commerce does not exempt from the tax the storage, use or other consumption of such property in this State after the shipment of the property in interstate or foreign commerce has ended.
>
> "The fact that tangible personal property is used in interstate or foreign commerce following its storage in this State does not exempt the storage of the property from the tax. Property is deemed to be stored in this State if held in this State for any period of time whatever following the delivery of the property to the purchaser or the termination of the interstate or foreign shipment of the property to the purchaser."

We sumbit that when the act is considered as a whole, together with the above mentioned Ruling No. 11, it becomes apparent that the act, as written and administered, levies a tax burden upon the privilege of using tangible personal property in *intrastate* commerce only.

ARGUMENT

I

"A State Excise Tax Imposed Directly Upon the Privilege of Using Instrumentalities in Carrying on and Conducting Interstate and Foreign Transportation and Commerce by a Railroad Common Carrier, Is a Direct Burden on Such Transportation and Commerce, Contrary to the Provisions of Article I Section 8, of the Constitution of the United States"

WITHDRAWAL FROM STORAGE AND INSTALLATION

Inasmuch as the tax in question is imposed in respect to the storage, as well as the use of tangible personal property in the State of California, and since under the Findings of Facts herein, all the property in question was held or retained by appellant for some period of time after the termination of its shipment to California, and before its actual installation and use in its railroad operation (R. 116-119) and the property was used in intrastate as well as in interstate and foreign commerce (R. 105), it seems unnecessary to argue the law applying to a case not before the court, that is a case where only interstate and foreign commerce is involved.

In other words, it seems out of place here to reopen the case of *Helson and Randolph* vs. *Kentucky,* 279 U. S. 245, or any of the other cases re-

ferred to by appellant under this heading, as they obviously can not be in point under the facts of this case.

Of the fifteen cases cited by appellant under this heading, nine were cases involving an attempt to tax companies engaged solely in interstate commerce, which is not the case here; four were cases involving statutes imposing a tax upon gross receipts of companies engaged in both interstate and intrastate commerce, the tax not being a property tax.

The other two cases are:

(a) *Midcontinent Air Express Corporation* vs. *Lujan* (1931), 47 Fed. (2d) 266, decided by a three-judge court for the District of New Mexico. The tax was upon the use of gasoline by the company in its interstate and intrastate business. The court said the latter was incidental to the former, but since the gasoline could not be apportioned between the two, the case was controlled by *Helson and Randolph* vs. *Kentucky, supra.* The New Mexico tax in question being imposed only upon the use of gasoline, this case, like the *Helson* and *Bingaman* cases, is not in point, as will hereafter be shown.

(b) The *Pacific Telephone and Telegraph Company* vs. *Henneford* (1938), ___ Wash. ___, 81 Pac. (2d) 786, wherein the Supreme Court of the State of Washington held that the compensating tax act of that state does not apply to goods not produced or sold in the state. A petition for writ of cer-

tiorari is pending in this court and at the time this brief is being written the petition has not been acted upon.

We submit that appellant's argument under this heading is wide of the issue before the court.

II

"A State Excise Tax Can Not Validly Be Applied Indiscriminately and Without Apportionment to an Instrumentality Common to Interstate and Intrastate Commerce"

We are not inclined to question this contention of appellant in so far as it is dependent for its support upon the sole authority cited therefor. *Cooney* vs. *Mountain States Telephone and Telegraph Company* (1935), 294 U. S. 384. Here again appellant advances a principle of law which, in our opinion, has no application to the present case.

In the *Cooney* case this court held that a state license tax upon persons or firms engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the state measured by the number of telephone instruments used in the conduct of that business could not constitutionally be applied to a company conducting a combined interstate and intrastate telephone business in the state. If the State of California were asserting herein a license tax upon those engaged in the business of operating a railroad measured by the amount of equipment used in the

operation thereof, then the *Cooney* case might well be asserted as authority for the contention that the tax was invalid as applied to the appellant which is, of course, engaged in intrastate and interstate commerce. The California use tax, however, bears no resemblance whatever to such a tax. It is not imposed for the privilege of engaging in any business whether of an interstate character or otherwise and it is not imposed upon the actual use of the property in the conduct of appellant's interstate business. On the contrary, the use tax as applied to appellant is imposed *inter alia* on the storage of property in the state, its withdrawal from storage or its installation, all of which events occur prior to its use in the conduct of appellant's business and which were held to be proper subjects for state taxation in *Nashville, Chattanooga and St. Louis Railway Company* vs. *Wallace* (1933), 288 U. S. 249, and *Edelman* vs. *Boeing Air Transport, Inc.* (1933), 289 U. S. 249, discussed hereafter, notwithstanding the subsequent use of the property in interstate commerce.

III

"The Case at Bar Is Distinguished by Its Facts from the Cases in Which the Privileges Taxed Were Not Acts of Conducting Interstate Transportation"

Appellant's attempt here to distinguish the principal cases relied upon by appellees furnishes an opportunity for appellees to establish the relevancy

of those cases to the issue involved herein and, in turn, to distinguish the cases relied upon by appellant.

The property which was subjected to the use tax was stored and subsequently used by appellant in the State of California in its inextricably commingled interstate, intrastate and foreign transportation business. The state contends the tax was valid, while appellant contends it was invalid and thus the essential issue is raised.

The cases which we consider to be most pertinent to the issue involved here are the following:

(a) *Eastern Air Transport* vs. *South Carolina*, 285 U. S. 147;

(b) *Gregg Dyeing Company* vs. *Query*, 286 U. S. 472;

(c) *Nashville, etc. Ry. Co.* vs. *Wallace*, 288 U. S. 249;

(d) *Edelman* vs. *Boeing Air Transport*, 289 U. S. 249;

(e) *Pacific Tel. & Tel. Co.* vs. *Tax Commission*, 297 U. S. 403;

(f) *Henneford* vs. *Silas Mason Co.* (1937), 300 U. S. 577;

(g) *Southern Natural Gas Corporation* vs. *Alabama* (1937), 301 U. S. 148;

(h) *Western Live Stock* vs. *Bureau of Revenue* (1938), 303 U. S. 250;

(i) *Coverdale* vs. *Arkansas-Louisiana Pipe Line Company* (1938), 303 U. S. 604.

See also

(a) *American Airways, Inc.* vs. *Wallace* (1932), 57 Fed. (2d) 877, affirmed 287 U. S. 565;

(b) *American Airways, Inc.* vs. *Grosjean* (1933), 3 Fed. Supp. 995, affirmed 290 U. S. 596;

(c) *Central Vermont Railway Co., Inc.* vs. *Campbell* (1937), ---- Vt. ----, 192 Atl. 197, 111 A. L. R. 175;

(d) *Commonwealth* vs. *Dixie Greyhound Lines, Inc.* (1934), 255 Ky. 111, 72 S. W. (2d) 1032.

The case which seems to be most nearly in point here is *Nashville etc. Ry. Co.* vs. *Wallace, supra.* That case, with others subsequently decided to the same effect, seems to us to be controlling. We can discover no principle involved in the case at bar which was not there considered and disposed of by this court adversely to appellant's contentions here.

The *Nashville* case was an appeal from the Supreme Court of Tennessee, which had decided it in favor of the state's taxing power under the particular state law in question. This court affirmed the decision of the state court.

The facts, briefly stated, were that the railroad company brought gasoline into Tennessee, stored it in tanks and withdrew it as required for use as a source of motive power for moving its *interstate* trains in that state and in other states.

The state statute in question imposed a privilege tax upon all persons *storing* gasoline in Tennessee and thereafter withdrawing it from storage, whether for sale or for other use.

The railway company assailed the tax on two grounds: (a) That it was imposed on the gasoline while still a subject of interstate commerce in the course of transportation from points of origin to points outside of the State of Tennessee, and (b) on the ground that the tax was in effect a tax upon the use of the gasoline in the company's business as an interstate carrier and therefore was an unconstitutional burden on interstate commerce.

We do not understand that the first contention above mentioned is presented here, but apparently appellant's principal reliance is upon the second contention.

This court in the *Nashville* case held:

(a) That the gasoline upon being unloaded and stored ceased to be a subject of transportation in interstate commerce and lost its immunity as such from state taxation (p. 266);

(b) The fact that the gasoline was, in the ordinary course of the company's business, later withdrawn from storage for use, some within and some without the state, part of it thus becoming again the subject of interstate transportation, did not affect the power of the state to tax it all before that transportation commenced (p. 266);

(c) The gasoline in storage was not a subject of interstate commerce and so was a part of the common mass of goods within the state, subject to local taxation (p. 266).

In the course of its opinion, the court stated:

"We can not say that the tax is a forbidden burden on interstate commerce because appellant uses the gasoline, subsequent to the incidence of the tax, as an instrument of interstate commerce. Taxes said to burden interstate commerce directly when levied upon or measured by the operation of interstate commerce or gross receipts derived from it, are beyond the state taxing power, *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465; 470; *Sprout* v. *South Bend*, 277 U. S. 163, 170, 171; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 297, and a tax levied upon the use of gasoline in generating motive power for a ferry boat used exclusively in interstate commerce has been held to be so direct and immediate a burden on the commerce itself as to be invalid. *Helson* v. *Kentucky*, 279 U. S. 245.

"But interstate rail carriers are not wholly immune from other forms of non-discriminatory state taxation, even though the burden of the tax is thus indirectly or incidentally imposed upon the interstate commerce in which they are engaged. It can not be doubted that, when the gasoline came to rest in storage, the state was as free to tax it, notwithstanding its prospective use as an instrument of interstate commerce, as it was to tax appellant's right of way, rolling

stock or other instruments of interstate commerce, which are subject to local property taxes. *Cudany Packing Co.* v. *Minnesota,* 246 U. S. 450; *U. S. Express Co.* v. *Minnesota,* 223 U. S. 335; *Western Union Telegraph Co.* v. *Gottlieb,* 190 U. S. 412; *Adams Express Co.* v. *Ohio,* 165 U. S. 194, 220; see *General American Tank Car Corp.* v. *Day,* 270 U. S. 367; *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245, compare *St. Louis-San Francisco Ry. Co.* v. *Middlekamp,* 256 U. S. 226, 231; *St. Louis, Southwestern Ry.* v. *Arkansas,* 235 U. S. 350; *Kansas City, F. S. & M. Ry. Co.* v. *Botkin,* 240 U. S. 227; *Kansas City, M. & B. R. Co.* v. *Stiles,* 242 U. S. 111; *Southern Ry. So.* v. *Watts,* 260 U. S. 519. The power to tax property, the sum of all the rights and powers incident to ownership, necessarily includes the power to tax its constituent elements. See *Bromley* v. *McCaughn,* 280 U. S. 124, 136-138. Hence, there can be no valid objection to the taxation of the exercise of any right or power incident to appellant's ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson* v. *Kentucky, supra.* Here the tax is imposed on the successive exercise of two of those powers, the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before the use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of

interstate commerce itself to transgress constitutional limitations. See *Eastern Air Transport* v. *Tax Commission*, 285 U. S. 147." (288 U. S. at p. 267.)

In the *Nashville* case, as in the instant case, a tax was asserted to be due with respect to property which had been shipped into the taxing state in interstate commerce, stored in the state for some period of time awaiting use, withdrawn from storage for immediate use in the operation of an interstate railroad and actually used in interstate commerce in such operation. In each case liability for the tax was based upon the storage or withdrawal from storage of the property after the termination of the interstate shipment and before the actual use in interstate commerce.

The *Nashville* case, therefore, seems to compel the conclusion finally arrived at by the lower court in this case in its opinion of May 3, 1938, that the tax statute here in question was valid and that its application with respect to the property of appellant violated no constitutional right of appellant.

The *Nashville* case was decided in 1933 and was preceded by *Eastern Air Transport* vs. *South Carolina*, and *Gregg Dyeing Company* vs. *Query*, *supra*, both of which are in harmony with the *Nashville* case. Since the decision in the *Nashville* case this court has decided the cases mentioned in (d) to (i) above, all of which appear to confirm and re-

affirm the principles decided in the *Nashville* case.

In three of those cases, namely, *Edelman* vs. *Boeing Air Transport, Inc., supra; Henneford* vs. *Silas Mason Company, supra;* and *Coverdale* vs. *Arkansas-Louisiana Pipe Line Company, supra,* the *Nashville* case was cited with approval and the principles there stated were expressly reaffirmed.

The cases of *Helson* vs. *Kentucky,* 279 U. S. 245, and *Bingaman* vs. *Golden Eagle Western Lines,* 297 U. S. 626, relied upon by the appellant, may readily be distinguished from the instant case. In those cases, it was held that a state tax could not be imposed on the use within the state of gasoline in the operation of an interstate ferry and motor carrier, respectively. In each case, however, the tax was sought to be imposed upon the use of gasoline in the state and the gasoline was placed in the fuel tanks of the ferry and motor vehicle prior to their entry into the taxing state. There was no storage or withdrawal from storage of the gasoline after its entry into the state and the tax was not, of course, asserted to be due by reason of any storage or withdrawal from storage, but could only be based upon the use of the gasoline, which was at all times a use in interstate commerce. The cases are, accordingly, in no sense in conflict with the *Nashville* and *Edelman* cases, nor do they, in view of the storage and installation of appellant's property in California after the termination of its interstate shipment to the state and before its use

in the operation of appellant's railroad, offer any support to appellant's position.

In the *Coverdale* case the *Helson* case, *supra*, and the *Cooney* case, 294 U. S. 384, were distinguished, the court saying, with reference to these two cases:

> "We think they belong to the category of cases which construe the state tax acts involved as taxes on interstate commerce and its instrumentalities rather than on operations closely connected with but distinct from that commerce. In the *Interstate* case (*State Tax Commission* v. *Interstate Natural Gas Co., Inc.*, 284 U. S. 41) and the *Cooney* case taxes levied on the business of engaging in interstate commerce were held invalid. Likewise, in the *Helson* case, this court concluded that the tax on gasoline brought into the state and used on an interstate ferry was analogous to a tax on the use of the ferry itself in transit and therefore within the rule prohibiting state taxes on commerce. A narrow distinction in fact exists between the tax held invalid in the *Helson* case and the valid tax considered in *Nashville, Chattanooga and St. Louis Ry. Co.* v. *Wallace*, 288 U. S. 249, where a tax on gasoline brought into the state, stored and then used to drive engines in interstate transportation, was held valid. The storage and withdrawal was an intrastate, taxable event. See also *Edelman* v. *Boeing Air Transport*, 289 U. S. 249, 252; *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 479."

The *Coverdale* case is of importance here for other reasons as we will try to develop.

Appellant's case is based on the premise that the use tax is exacted for the privilege of using the materials and supplies in the operation of appellant's interstate commerce business. However, as the act is written and administered it taxes only the privilege of local storage, use or consumption.

In the *Coverdale* case this court stated the question as follows:

> "The question is whether a state statute imposing a privilege tax on the production of mechanical power contravenes the interstate commerce clause in so far as it is applied to an engine used to supply mechanical power to a compressor which increases the pressure of natural gas and thus permits it to be transported to purchasers in other states."

The court was of the opinion that the state statute did not contravene the commerce clause because:

(1) The tax fell alike on those engaged in interstate or in intrastate commerce, or in both;

(2) Privileges, closely connected with the (interstate) commerce may be regarded as distinct for purposes of taxation;

(3) Increased cost alone is not sufficient to invalidate the tax as an interference with interstate commerce;

(4) The tax can not be imposed by another state.

Applying those tests to the present case we see that:

(1) The use tax falls alike on everyone regardless of the type of business engaged in and, therefore, is nondiscriminatory.

(2) The use tax does not burden appellant's interstate commerce in that

(a) It taxes a privilege which is merely closely connected with appellant's interstate commerce, that is, storage, installation or intrastate use.

(b) It might add to appellant's costs the same as a property tax, but cost alone is not sufficient.

(c) No other state can tax the privilege of storing, installing or using (in intrastate business) the materials and supplies in the State of California.

Appellant attaches great significance to its asserted predetermined intent to use all tangible personal property purchased by it in the operation of its intermingled interstate and intrastate railroad system. It may be stated at the outset that all the property purchased by the appellant is not ultimately used in the course of its operations, but that some portion thereof is sold or devoted to other uses (R. 120-126). Even though it be assumed, however, that there existed a predetermined intent on the part of appellant to use all property purchased by it in its intermingled interstate and intrastate operation and the property was actually so used, such intent and use,

would not preclude under the *Nashville* and *Edelman* cases the application of the tax to the storage or installation of the property. In these cases liability to pay the tax in question arose at the time of the withdrawal of gasoline from storage for use in interstate commerce. The conclusion is, accordingly, inescapable that at the time the taxes were imposed there was a predetermined intent on the part of the carriers to use the gasoline in interstate commerce, for the gasoline was at that time placed in the fuel tanks of the carriers. Furthermore, the court's statement of facts in the *Nashville* case clearly indicates that none of the gasoline purchased by the railroad outside the taxing state and stored within the state was sold, but that all was withdrawn and used by it as a source of motive power in interstate railway operation. Authorities such as *Coe* vs. *Errol,* 116 U. S. 517; *Minnesota* vs. *Blasius,* 290 U. S. 1; *Oliver Iron Min. Co.* vs. *Lord,* 262 U. S. 172; *Eastern Air Transport* vs. *Tax Commission,* 285 U. S. 147; *Superior Oil Co.* vs. *Mississippi,* 280 U. S. 390, and *American Airways* vs. *Wallace,* 57 Fed. (2d) 877, 880, 287 U. S. 565, also establish that the actual status of property rather than the intent of the owner thereof is the controlling factor in determining whether the commerce clause precludes the application of a state tax. It is submitted, accordingly, that appellant's contention that the tax can not be applied with respect to its property in view

of its asserted predetermined intent to use that property in interstate commerce is wholly without merit.

The burden of appellant's argument is the familiar one, variously stated but consistently found in practically all cases involving taxation of interstate railroads, to the effect that the tax in question imposes a direct burden upon interstate commerce and is therefore in violation of the provisions of Article I, section 8, clause 3, of the Federal Constitution and that it deprives the company of its property without due process of law, and denies it the equal protection of the laws. That these contentions are unsound in the case at bar is, we submit, completely established by the cases hereinabove referred to.

IV

"The Unconstitutionality of State Excise Taxation Burdening Interstate Commerce Is Not Avoided by Imposing State Taxes at an Equal Rate on Intrastate Commerce or Other Intrastate Privileges"

In its argument here it seems to us that appellant falls into error in assuming for the purpose of the argument that the tax in question imposes a direct burden upon interstate commerce. In the foregoing part of our brief we have endeavored to show that there is no burden, direct or indirect, upon interstate commerce, and we have cited

numerous cases which appear to us to be determinative of that question.

But under this heading appellant introduces the proposition that if it be held that the tax is validly imposed because it is an excise tax on intrastate commerce, municipalities and other subdivisions of the state could exercise a like taxing power, and from this point appellant advances to the proposition that the intervening states and their municipalities could all impose taxes upon the same property, to the total destruction of interstate commerce.

The argument falls of its own weight because the tax in question is not upon the privilege of engaging in interstate commerce. It is suggested by appellant, but not in any way confirmed, that if the tax in question here is sustained, "every county, city, town and village in the United States could and undoubtedly would impose excise taxes upon the privilege of using railroad property or maintaining a station or a ticket office or some other action essential to the carrying on of railroad transportation" (appellant's brief, p. 29).

Whether appellant is justified in drawing this dire picture of the destruction of interstate transportation by confiscatory taxation is beside the point; certainly in this case we are not confronted with any such problem as it seems obvious that no other state could tax the storage, use or consumption of property *in California*.

In this connection reference is again made by appellant to the *Helson* case but since that case, for reasons hereinbefore referred to, is not in point we believe this line of argument need not be pursued any further.

Appellant also refers here to *Adams Mfg. Co.* vs. *Storen*, 304 U. S. 307, decided on May 16, 1938.

The *Adams* case involved an Indiana statute imposing a *gross receipts* tax on commerce. This court held (Mr. Justice Black dissenting) that the tax was unconstitutional under the commerce clause because "such a tax is a regulation of, and a burden upon, intertsate commerce prohibited by Article I, section 8, of the constitution."

However, the court pointed out that the vice of the statute lay in the fact that the tax included in its measure, without apportionment, receipts from activities in interstate commerce and that if lawful it could be laid to the fullest extent by states in which the manufactured goods were sold, and thus interstate commerce would be subjected to the risk of a double tax burden to which intrastate commerce is not exposed and which the commerce clause forbids.

We have no quarrel with the decision in the *Adams* case and respectfully submit that it is not in point here in any respect.

V

"This Tax Is Directly Imposed Upon the Privilege of Engaging in Interstate Commerce and Therefore Is an Undue and Unconstitutional Burden on Such Commerce"

Here we find appellant making the same argument already made under other headings to the effect that the tax in question is a direct burden upon interstate commerce. Appellant approaches the argument from a slightly different angle inasmuch as there is here cited cases which go back many years in point of time even to and including that familiar stand-by, *McCulloch* vs. *Maryland,* 4 Wheat. 316, which has been cited, it seems to us, in support of almost every question involving protection by the federal constitution from state taxation.

Appellant discusses here the boundaries beyond which state taxation (in respect to interstate commerce) is not permitted. As appellant concedes (brief, p. 31) the general rule respecting state taxation of interstate commerce is not so applied as to relieve those engaged in such commerce from their just share of state taxes. It is also true that this court has observed at least one boundary beyond which state taxation is not permitted and, generally speaking, that boundary is reached when the effort is to impose direct taxation upon the privilege of engaging in interstate commerce. The

real issue in this case, as we see it, is whether the statute in question passes the boundary erected against state action. Appellant's insistence is that it does, but we think appellant has wholly failed to prove its point either in fact or in law. On the other hand, the facts as well as the applicable court decisions show that the statute is well within the permissible boundary.

At this point, and generally throughout its brief, appellant has attempted to distinguish the case of *Henneford* vs. *Silas Mason Co.* (1937), 300 U. S. 577, from the instant case. In the *Silas Mason* case this court upheld the validity of the compensating tax of the State of Washington, a tax which is essentially identical with the tax involved herein. While it is true that the case did not involve the application of the tax with respect to property subsequently used in interstate and intrastate commerce, it clearly established the validity of a state tax upon the storage or use of tangible personal property in the State after the termination of the interstate shipment of the property. Further discussion of this point is unnecessary for as the court stated,

> "A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate. *Nashville, C. & St. L. Ry. Co.* v. *Wallace, Supra; Edelman* v. *Boeing Air Transport Inc., Supra; Monamotor Oil Company* v.

Johnson, Supra; Cf. Vancouver Oil Co. v. Henneford, Supra". (300 U. S. 577, 583.)

It is certainly significant that the court cited as authority for this most emphatic statement the *Nashville* and *Edelman* cases upon which appellees herein place their principal reliance.

The Washington statute allowed an exemption from the tax to the extent to which the sale or use of the property was already subjected to a tax under the laws of the state or some other state; the California act, however, allows an exemption from the tax only in cases in which the California retail sales tax applies with respect to the sale of the property. This difference is believed to be wholly immaterial, for as the court clearly indicated in the *Silas Mason* case, at page 587 of its opinion, the exemption allowed in the Washington statute with respect to taxes paid other states was not essential to the validity of the tax. It may also be observed that the South Carolina act upheld in the case of *Gregg Dyeing Company* vs. *Query*, 286 U. S. 472, relied upon in the *Silas Mason* case, limited the exemption from the tax thereby imposed to gasoline with respect to which another tax had been paid to that state. The tax acts upheld in the *Nashville* and *Edelman* cases, likewise did not allow an exemption or credit in cases in which taxes were paid to other states. In any event, the matter of an offset or credit for taxes paid other states is not involved herein for it has not been asserted that a

sales tax or any form of tax has been imposed by another state with respect to the property in question.

There can be no doubt but that the California tax would be valid as a property tax. *Johnson Oil Refining Co.* vs. *Oklahoma* (1933), 290 U. S. 158, and cases cited therein. It is noteworthy that in its opinion in the *Silas Mason* case the court likened the Washington tax to a property tax and relied upon cases upholding taxes on property used in interstate commerce. In the course of its opinion the court stated:

> "The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. *Nashville, C. & St. L. Ry. Co.* v. *Wallace, Supra; Bromley* v. *McCaughn,* 280 U. S. 124, 136-138; *Burnet* v. *Wells,* 289 U. S. 670, 678. A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively. Ibid. Calling the tax an excise when it is laid solely upon the use (*Vancouver Oil Co.* v. *Henneford,* 183 Wash. 317, 49 P. (2d) 14) does not make the power to impose it less, for anything the commerce clause has to say of its validity, than calling it a property tax and laying it on ownership. 'A nondiscriminatory tax upon local sales * * * has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected.'

Eastern Air Transport, Inc. v. *South Carolina Tax Comm'n*, 285 U. S. 147, 153." (300 U. S. 577, 582.)

"But the fact that the legislature has chosen to lay a tax upon the use of chattels that have been bought does not make the tax upon the use a tax upon the sale. One could argue with as much reason that there would be a tax upon the sale if a property tax were limited to chattels so acquired." (300 U. S. 577, 587.)

The California Use Tax Act does not impose a tax upon appellant's transportation business; it does not impose a tax upon the privilege of engaging in that business, nor does it impose a tax upon the gross receipts from such business.

It does impose a tax upon the privilege of storing, using or consuming property in the state, such property being admittedly used in inextricably commingled interstate and intrastate commerce.

Such a tax, we submit, is well within permissible boundaries and has been approved by this court.

Gregg Dyeing Co. vs. *Query, supra;*
Nashville, etc. Ry. Co. vs. *Wallace, supra;*
Southern Natural Gas Corporation vs. *Alabama, supra;*
Western Live Stock vs. *Bureau of Revenue, supra;*
Coverdale vs. *Arkansas Louisiana Pipe Line Company, supra,*

and other cases cited herein.

VI

"The Tax Is Extra-Territorial in Its Operation and Effect and in Violation of the Due Process Clause of the Federal Constitution"

Appellant refers at page 46 of its brief to "the foregoing statement of facts" by which we assume reference is intended to the "Stipulation of Facts" (R. 71), but we are not informed as to which paragraphs of the stipulation of facts are intended to be referred to. However, since reference is made to "general stores and purchasing department," we assume that paragraphs 21 to 26 (R. pp. 78-9), both inclusive, are the particular paragraphs to which attention is intended to be drawn.

The gist of appellant's argument here appears to be this:

That after railroad materials and supplies are shipped to California and the interstate transportation thereof is terminated, such materials and supplies are devoted to railroad uses in such a manner that an indeterminable portion thereof may be installed in interstate trains and used partly within and partly without the state in the course of the movement of the interstate train. That "when the full measure of the use tax is imposed upon an inseparable part of use, a small part of which use might occur within California, the remaining use occurring in other states, such imposition makes a direct tax and burden on the operations of interstate commerce in other states."

Appellant then says:

> "It is settled that a state cannot, in the guise of excise taxation, impose charges which result in taxing things, actions or privileges wholly beyond her jurisdiction and control. Such a tax is in conflict with the due process clause of the Fourteenth Amendment to the Constitution of the United States."

It seems to us that the foregoing merely begs the question and does not advance the argument beyond the scope of the contentions previously made by appellant. In other words, the argument simply assumes, without support in the record, that the tax in question is upon *interstate* commerce instead of being solely upon the *intrastate* storage, use or consumption, whichever first occurs.

The case of *Norfolk, etc. Railroad Company* vs. *Pennsylvania*, (1890), 136 U. S. 114, cited here by appellant, is obviously not in point. That case involved a state act imposing an annual license tax upon foreign corporations for the privilege of keeping an office in the state for the use of officers, stockholders, agents and employees. The tax was measured by a percentage of the authorized capital stock of the corporation.

It was held that the "office was maintained because of the necessities of the interstate business of the company, and for no other purpose. A tax upon it was, therefore, a tax upon one of the means or instrumentalities of the company's interstate commerce; and as such was in violation of the commer-

cial (sic) clause of the Constitution of the United States."

We need not discuss in detail the *Norfolk* case. The facts of that case are not present here. In any event, we submit that the *Coverdale* case, *supra*, is much more nearly apposite in its facts to the case at bar, and that under the authority of that case the tax here in question must be upheld.

In the *Coverdale* case this court said:

"The language of the state statute makes it quite certain that this privilege tax falls alike on those engaged in interstate or in intrastate commerce, or in both. While a privilege tax by a state for engaging in interstate business has frequently met the condemnation of this Court as a regulation of commerce, privilege taxes for 'carrying on a local business,' even though measured by interstate business, have been sustained. *American Mfg. Co.* v. *St. Louis*, 250 U. S 459; *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1; cf. *Western Live Stock* v. *Bingaman*, 303 U. S. ____, No. 322. October Term, 1937, decided February 28, 1938. The present case falls well within the line of state tax authority.

"Taxation by the states of the business of interstate commerce is forbidden only because it is deemed an interference with that commerce, the uniform regulation of which is necessarily reserved to the Congress. Minnesota Rate Cases, 230 U. S. 352, 400. As this source of revenue, even if treated in a non-discriminatory manner, is withdrawn from local reach by

inference from the delegated grant, the exemption of those engaged in interstate commerce from the taxation others bear should not be extended beyond the necessity of keeping that commerce free from interference. Consequently, property taxes on the instrumentalities or net income taxes on the proceeds of interstate commerce are upheld. *Cudahy Packing Co.* v. *Minn.*, 246 U. S. 450; *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321.

"Privileges closely connected with the commerce may be regarded as distinct for purposes of taxation. So, local privilege taxes on storage in transit, compressing or dealing in cotton, already moving in its interstate journey from plantation to mill, are validated as imposed upon operations in connection with a commodity withdrawn from the transportation movement. *Federal Compress Co.* v. *McLean*, 291 U. S. 17, 21; *Chassaniol* v. *Greenwood*, 291 U. S. 584; cf. *Minnesota* v. *Blasius*, 290 U. S. 1. And similar taxes are upheld for the privilege of mining ores or producing gas, notwithstanding the 'practical continuity' of the taxed productive operation and the interstate movement. *Oliver Iron Co.* v. *Lord*, 262 U. S. 172; *Hope Gas Co.* v. *Hall*, 274 U. S. 284. In *Utah Power and Light Company* v. *Pfost*, 286 U. S. 165, an Idaho statute taxing the generation of electricity at so much a kilowatt hour was upheld because a difference was perceived between the conversion of the mechanical energy of falling water into electrical energy and the transportation of the latter. The tax here imposed on

the operation of the machinery is of the same type."

Appellant Has Not Sustained the Burden Imposed on It of Proving an Illegal Interference With Its Interstate Commerce

We have denied all the allegations in appellant's complaint referring to an alleged burden imposed upon appellant's interstate commerce by the use tax. Therefore, the record must be searched to determine if appellant has proved an illegal burden.

The only reference in the record that might be said to have a remote bearing upon this question is the following:

> "By reason of its inextricably intermingled interstate, foreign and intrastate commerce and business, plaintiff is compelled to purchase from points outside of California and to use and consume a greater amount of tangible personal property than it would be required to purchase if it were engaged only in intrastate railroad transportation business." (R-126.)

In the *Pacific Telephone & Telegraph* case, *supra*, at page 413, the court said:

> "* * * But the high tax on the local privilege, like the low rate for the local traffic, if it burdens interstate commerce at all, does so by reason of its consequences. This being so, a tax upon the local privilege only must be held valid in the absence of proof that it imposes an undue burden upon interstate commerce. 'The question of constitutional validity is not to be

determined by artificial standards.' See *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 480, 52 S. Ct. 631, 634, 76 L. Ed. 1232, 84 A. L. R. 831. The alleged indirect tax must be judged by its practical operation.

"*In its effect upon interstate commerce an occupation tax solely upon local business does not differ from an ad valorem property tax upon tangible property used exclusively in such business.* Each increases the necessary cost of doing the local business. Either might conceivably be so large as to render the local business immediately unprofitable. A common carrier cannot be compelled to carry on business indefinitely at a loss. *Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U. S. 396, 40 S. Ct. 183, 64 L. Ed. 323; *Bullock* v. *Florida,* 254 U. S. 513, 520, 521, 41 S. Ct. 193, 65 L. Ed. 380; *Railroad Commission* v. *Eastern Texas R. Co.,* 264 U. S. 79, 85, 44 S. Ct. 247, 68 L. Ed. 569. If, because of such loss, a corporation, seeing no prospect of betterment, wished to discontinue its local business and were prevented by law from doing so unless it discontinued also its interstate business, the law might be held void as imposing an unconstitutional condition upon the privilege of engaging in interstate commerce. Compare *Pullman Co.* v. *Adams,* 189 U. S. 420, 23 S. Ct. 494, 47 L. Ed. 877. If it was the tax which caused the unprofitableness of the local business and, consequently, the desire to discontinue it, the tax would then appear as a direct burden on interstate commerce. Compare *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252, 258, 39

S. Ct. 265, 63 L. Ed. 590; *Postal Telegraph-Cable Co.* v. *Fremont,* 255 U. S. 124, 127, 41 S. Ct. 279, 65 L. Ed. 545. But no reason has been suggested why a tax upon the local business should be held void, if, despite its burden, the local business is conducted at a profit; or if, although conducted at an apparent loss, the corporation desires to continue it because of benefits present or prospective. Compare Ohio Tax Cases, 232, U. S. 576, 590, 34 S. Ct. 372, 58 L. Ed. 737.

"Second. Inherently the tax challenged is unobjectionable. It is not upon an instrumentality of interstate commerce; it is moderate in amount; and is not a disguised attempt to discriminate against interstate commerce. As the collection is being made by an action at law, the tax is not open to the objection raised in *Western Union Telegraph Co.* v. *Massachusetts,* 125 U. S. 530, 554, 8 S. Ct. 961, 31 L. Ed. 790, that payment may be made a condition of continuing to do business. Compare *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 119, 41 S. Ct. 45, 65 L. Ed. 165. The tax is 'imposed solely on account of the intrastate business;' and it appears that the amount exacted is not increased 'because of the interstate business done.' Compare *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, 470, 51 S. Ct. 499, 500, 75 L. Ed. 1171. Although the two branches of the business of the companies are inseparable, the tax is not laid inseparably upon both. Thus it is not open to the objection held fatal in *Leloup* v. *Mobile,* 127 U. S. 640, 8 S. Ct.

1380, 32 L. Ed. 311, and *Cooney* v. *Mountain States Telephone & Telegraph Co.*, 294 U. S. 384, 55 S. Ct. 477, 79 L. Ed. 934. 'Certainly one cannot avoid a tax upon a taxable business by also engaging in a nontaxable business.' *Raley & Bros* v. *Richardson*, 264 U. S. 157, 159, 44 S. Ct. 256, 257, 68 L. Ed. 616. * * *"

When we consider that appellant uses every article that it purchases in conducting its *intrastate* commerce and that we do not find any reference in the complaint or the stipulation to the possible effect of the tax on appellant's profits or losses along with the *general* statement that appellant is compelled to purchase, use and consume a greater amount of property than it would purchase if it were engaged only in intrastate commerce, we submit that appellant *has not sustained* the burden imposed upon it of proving a *direct* interference upon interstate commerce resulting from the imposition of this tax.

Certainly there might possibly be some remote burden, but in the case of property taxation on instrumentalities of interstate commerce we also find a remote burden which has been repeatedly held to be insufficient to invalidate the tax.

This court has recognized that the power to tax is vital to a state, and it has given to that power a form which permits some incursion on interstate commerce; i.e., it is only when the tax directly interferes with interstate commerce that it is invalidated.

If appellant were engaged solely in intrastate commerce, there would be no question of the validity of the tax in question—*Henneford* vs. *Silas Mason Co., supra;* therefore, we submit that such a tax can not be invalidated by the mere fact that appellant also uses the same property in its interstate commerce. (*Pac. Telephone & Telegraph* case, *supra.*)

Appellant does not show the quantity that must be purchased solely because of its interstate commerce, or state in any way how this tax imposed solely on *intrastate* use directly burdens its interstate commerce.

We submit that appellant has not proved that the tax imposed solely upon intrastate use of the materials would burden its interstate commerce.

In conclusion we submit that in the case at bar there has been no attempt to tax things, actions or privileges beyond the jurisdiction or control of the state, but that, on the contrary, the tax in question has its incidence only in relation to things, actions or privileges existing, taking place or exercised within the state and, therefore, within the boundaries of permissible taxation as delimited by this court.

Respectfully submitted.

U. S. WEBB,
Attorney General,

H. H. LINNEY,
Deputy Attorney General,

JAMES J. ARDITTO,
Deputy Attorney General,
Attorneys for Appellees.

o